PretiFlaherty

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Via Electronic Filing
Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253
WC Docket No. 10-143
Notice of *Ex Parte* Presentation

Dear Ms. Dortch:

On February 25, 2011, the undersigned counsel to Lincolnville Networks, Inc., Tidewater Telecom, Inc., Oxford Telephone Company and Oxford West Telephone Company (the "Lincolnville & Oxford RLECs") attended an *ex parte* meeting with Edward P. Lazarus and Zachary Katz from Chairman Julius Genachowski's office, and Jennifer Prime, Lisa Gelb, William Dever, and Tim Stelzig from the Wireline Competition Bureau, along with William S. Kelly and Thomas J. Moorman, both on behalf of UniTel, Inc. ("UniTel"). The Honorable Jack Cashman, Chairman of the Maine Public Utilities Commission ("MPUC") and Andrew Hagler, Director of Telephone and Water Utility Industries of the MPUC, attended via telephone conference. (The Lincolnville & Oxford RLECs and UniTel being referred to herein as the "Maine RLECs").

The Lincolnville & Oxford RLECs concur in the statements regarding the February 25 meeting in the Notice of *Ex Parte* Meeting submitted on February 28, 2011, by UniTel counsel. The Lincolnville & Oxford RLECs would also specifically note that, just as UniTel, they currently provide broadband to nearly or at 100% of their service areas at speeds which meet or exceed the applicable National Broadband Plan articulated goals;[1] and, they are presently, and have been at all times, connected to the Public Switched Telephone Network and no fact exists in this record or

[1] In a recent ex parte letter, dated March 2, 2011, Time Warner touts the assertion that it has expanded its services in portions of three of its franchise areas in Maine located outside the areas of the Maine RLECs in these proceedings. Time Warner's testimony before the MPUC indicates that it serves a total of 261 franchise areas in Maine. Time Warner's claims regarding expansion in only three discrete areas (the boundaries of which are not described) have no comparison to the universality of the provision of broadband services throughout the service areas of the Maine RLECs involved in this proceeding. In fact, Time Warner's reference to only three discrete areas in Maine, when it has 261 franchises, actually undermines its claims that, in the absence of the MPUC's decision, Time Warner's broadband services would widely flow to the areas it currently does not serve. Moreover, the three areas cited in Time Warner's letter are the same three areas described in testimony submitted by Time Warner in Maine a year ago, which again undermines Time Warner's claims. It would seem that Time Warner has no new examples arising in the past year to present to the Commission. Time Warner appears to be grasping at straws, and has provided the Commission with no substantial record evidence upon which the Commission could credibly agree with the broad implications Time Warner is asking the Commission to make in this case. The Lincolnville & Oxford RLECs respectfully suggest that, if the Commission wishes to give any consideration to such assertions being made by Time Warner, that the Commission direct a question to Time Warner to provide specific and substantiated evidence of its claims.

before the MPUC that they have blocked any traffic from any carrier. In addition, the Lincolnville & Oxford RLECs hereby note that their counsel focused on the following points during the February 25 meeting.

During the February 25 meeting, counsel for the Lincolnville & Oxford RLECs emphasized that a Declaratory Ruling, based on a claimed need to "terminate a controversy," was not appropriate. In the first instance, there is no controversy (or for that matter uncertainty) because the law is clear, as articulated in the 2006 *Brazos* decision of the U.S. District Court in Texas, which continues to stand unchallenged and unappealed. In fact, the previous decisions of the Commission in the *ZTel* case and the *Number Portability* case are in accord with *Brazos*. The court decisions cited by the proponents of preemption as being contrary to *Brazos* are not on point with *Brazos*. The analysis in the *Harrisonville* decision of the U.S. District Court in Illinois is grounded on the underlying substantive obligation of a rural telephone company to comply with Section 251(b) duties. The *Harrisonville* decision did not specifically address the distinct issue of the obligation to arbitrate with regard to such duties, which was the specific issue addressed in the *Brazos* decision. In fact, the *Harrisonville* decision makes no mention of the *Brazos* decision, which had been issued a year earlier. The *Vermont Telephone* decision of the U.S. District Court in Vermont, which was proffered by the proponents of preemption, was made in the face of a factual situation in which the Vermont rural telephone company had already engaged in negotiations with the CLEC, which is a foundational factual premise which does not exist in the *Brazos* case. Moreover, the *Vermont Telephone* decision cites the *Harrisonville* decision, which does not specifically address the essential issue in the *Brazos* decision, and does not directly address the logic of the *Brazos* decision. Thus, the issue is not joined between these decisions and *Brazos*, and any controversy and uncertainty claimed by the preemption proponents is, therefore, not a decisional controversy or uncertainty, but rather is no more than a reflection of the proponents' own disagreement with the decision of the MPUC.

Counsel for the Lincolnville & Oxford RLECs further argued that the issue of subject matter jurisdiction of the state commission to arbitrate is an issue controlled by a statute, which is to be interpreted and applied, in the first instance, by the entity before which the jurisdictional issue is raised, *i.e.* the state commission, subject to the review of that jurisdiction decision by the court, if an appeal is appropriately taken from such decision. This is not a matter of a regulatory agency interpreting or filling in the gaps in a statute regarding technical matters within the expertise of a regulatory agency; if that were required, then a proposed rule would be offered and all interested parties would comment on it including, but not limited to, the legal basis for such a rule. In this proceeding, however, the question is one of statutory interpretation, in which the strict rules of statutory construction (uninfluenced by policy preferences) are to be applied by the forum and by the courts upon review of that forum's decision.[2]

Counsel for the Lincolnville & Oxford RLECs also emphasized the need for a resolution which preserves the finality of the results reached in Maine after over two years of costly litigation before the MPUC, from which no appeal was taken of any decision or order made by the MPUC

[2] In fact, if there is to be any judicial deference to an agency decision regarding the interpretation of statute regarding jurisdiction to arbitrate, that deference is owed to the state commission, which is the agency charged by Congress with the responsibility to administer the section 251(f)(1) rural exemption provisions of the 1996 revisions to the Communications Act of 1934, as amended (the "Act").

over that time period, including the MPUC's decision in May 2008 on its lack of jurisdiction to arbitrate in the face of the existence of the Rural Exemption, the MPUC's decision in November 2008 to dismiss Time Warner's initial termination petition for failure to meet its burden of proof, and the MPUC's decision in July 2010 that, based on all of the evidence presented (much of which was Time Warner's own evidence), termination of the section 251(f)(1) rural exemption of the Maine RLECs would produce undue economic harm and threaten the goal of universal service. The history shows that the preemption petition effectively constitutes an attempt to now end run the results of a process in which Time Warner and CRC Communications of Maine, Inc. voluntarily participated and pursued.[3] Whether the Commission were to grant the petition for preemption, or to issue a declaratory ruling to a similar effect, the Commission will have rewarded the petitioners' actions in first lying in the weeds and then seeking to end run the July 2010 section 251(f)(1) decision, by filing their belated petition to preempt the May 2008 decision.[4]

The Lincolnville & Oxford RLECs respectfully submit that if one of the fundamental Congressional objectives in enacting the rural exemption provisions of the Act is to be sustained, *i.e.* to protect the ability of small rural telephone companies to provide universal service which meets the telecommunications needs of customers in their entire service areas at affordable rates, then the results in Maine should not be disturbed by a preemption order or a declaratory ruling, or any other action of this Commission.

Respectfully submitted,

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cc: Edward Lazarus
Zackary Katz
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William Dever
Timothy Stelzig
The Honorable Jack Cashman
Andrew Hagler
Stephen Kraskin
William Kelly
Thomas Moorman

[3] Time Warner's attack on the MPUC's July 2010 decision in the second footnote of its March 1 *ex parte* letter shows that Time Warner has no regard for the factual findings of the MPUC and may probably be again lying in the weeds planning an attack on those findings at some point in the future.

[4] It can be fairly inferred that Time Warner pursued the section 251(f)(1) proceedings before the MPUC, at the same time Time Warner believed that the section 251(f)(1) proceedings were without meaning and that section 251(f)(2) was the only means by which the MPUC could address the issues of undue economic harm and the protection of universal service goals *vis a vis* the request made of each of the Maine RLECs. In these circumstances it is fair that Time Warner should be deemed to have waived any argument that there is now a need for a *de novo* section 251(f)(2) proceeding, as intimated in Time Warner's March 1 *ex parte* letter.